

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

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	)	
	)	
In re: BRIDGESTONE/FIRESTONE, INC.,	)	Master File No. IP 00-9373-C-B/S
TIRES PRODUCTS LIABILITY	)	MDL No. 1373
LITIGATION	)	(centralized before Hon. Sarah Evans
	)	Barker, Judge)
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THIS ORDER RELATES TO:	)	
	)	
GINA SANTANGELO, et al., Plaintiffs, v.	)	
	)	Individual Case No. IP 01-5369-C-B/S
BRIDGESTONE/FIRESTONE, INC., et al.,	)	
Defendants.	)	
	)	
	)	
GLEND K. POWELL, et al., Plaintiffs, v.	)	
	)	Individual Case No. IP 01-5509-C-B/S
BRIDGESTONE/FIRESTONE, INC., et al.,	)	
Defendants.	)	

**ORDER ON VARIOUS PROCEDURAL MOTIONS**

These matters are before the Court on several pending procedural motions in these two related cases. The plaintiffs in Powell (01-5509) have filed a motion for remand of their case to state court for lack of federal subject matter jurisdiction. They have also requested leave to file a second amended complaint. Defendant Bridgestone/Firestone, Inc. (“Firestone”) has filed a motion to sever claims in Powell and to dismiss certain plaintiffs’ claims. Plaintiffs in Santangelo (01-5369) (hereafter referred to as “Santangelo”

I”) seek voluntary dismissal without prejudice of that case. Parties in both cases seek modification or clarification of certain briefing or other case management schedules. For the reasons set forth in the discussion below, the Court rules as follows: (1) plaintiffs’ motion to remand in Powell is DENIED and Tolleson Automotive, Inc. (“Tolleson Automotive”) is DISMISSED from this action; (2) Firestone’s motion to sever in Powell is GRANTED as follows: the Powell case is severed into three actions: Powell (which will retain Case No. 01-5509) (hereafter referred to as “Severed Powell”), Santangelo (to be assigned a new cause number) ( hereafter referred to as “Santangelo II”), and Gonzalez (to be assigned a new cause number); (3) Santangelo II is DISMISSED WITHOUT PREJUDICE; (4) plaintiffs’ motion for voluntary dismissal of Santangelo I is DENIED; (5) the Court will defer ruling on the plaintiffs’ motion for leave to file a second amended complaint as explained below; (6) plaintiffs in Santangelo I shall respond to Firestone’s motion to dismiss their claims on spoliation grounds and motion for summary judgment on statute of limitations grounds on or before September 3, 2002, and Firestone may file its reply briefs within twenty-one days thereafter; (7) the Severed Powell case shall be deemed a fourth quarter 2001 domestic case for case management purposes; and (8) the Gonzalez case shall be deemed a fourth quarter 2001 “*forum non conveniens*” case for case management purposes.

### **Discussion**

Gina Santangelo and Brandon Boisclair (through his guardian Paul Boisclair) brought an action on May 8, 2001, in federal district court in California for injuries they sustained in an accident that occurred in California on May 11, 1998. (Santangelo I). Three days later, these same two plaintiffs brought an action (Powell) based on the same facts in state court in Mississippi, joining their claims with those of Glenda Powell, who sued for damages arising from an accident in Mississippi, and Bertha Gonzalez and Christina Martinez, who sued for damages arising from an accident in Mexico. The defendants removed the Powell case to federal court. Both Santangelo I and Powell were transferred to this MDL.

### **Motion to Remand**

Gina Santangelo and Brandon Boisclair ask this court to dismiss Santangelo I without prejudice so that they can litigate their claims as part of the Powell case, which, according to the plaintiffs, should be remanded to Mississippi state court by virtue of the presence of a non-diverse defendant, Tolleson Automotive. We address the remand motion first.

According to the complaint in Powell, plaintiff Glenda Powell purchased the Firestone tires at issue at an unidentified location in Durant, Mississippi that had been supplied by Tolleson Automotive. She asserts claims against Tolleson Automotive based

on strict liability theories. The other plaintiffs in the case have made no allegations of any relationship with Tolleson Automotive. Firestone maintains that removal was proper because Tolleson Automotive was fraudulently joined.<sup>1</sup> In determining whether Tolleson Automotive was fraudulently joined, we must ask if “there is a reasonable possibility that the [plaintiffs] could recover against [Tolleson Automotive].” Schwartz v. State Farm Mutual Auto Ins., 174 F.3d 875, 878 (7<sup>th</sup> Cir. 1999).

The Seventh Circuit<sup>2</sup> has made clear that it is appropriate for the district court to look beyond the pleadings when it applies the fraudulent joinder test. See, e.g., Schwartz, 174 F.3d at 879 (holding that liability was not a reasonable possibility “based on [the] law and the *facts*” before the court)(emphasis added); LeBlang Motors, Ltd. v. Subaru of America, 148 F.3d 680, 690-91 (7<sup>th</sup> Cir. 1998)(court determined from discovery responses that statute of limitations barred action against defendant, who was thus fraudulently joined); Gottlieb v. Westin Hotel, 990 F.2d 323, 328 (7<sup>th</sup> Cir. 1993)(“[b]ased on the *facts* available, it appears [defendant could not be liable]”). We therefore will consider the entire record to determine whether there is a reasonable possibility that the plaintiffs could recover from Tolleson Automotive.

Tolleson Automotive has submitted unrefuted evidence that it did not supply the

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<sup>1</sup>Firestone has made other arguments in support of federal subject matter jurisdiction, but we need not and do not address them.

<sup>2</sup>The law of the Seventh Circuit governs the removal and remand issues presented in this case. Halkett v. Bridgestone/Firestone, Inc., et al., 128 F.Supp.2d 1198 (S.D. Ind. 2001).

tires at issue. In fact, it appears that plaintiffs not only have failed to dispute this, but have also sought leave to amend to name as a defendant the business they now believe did sell the tires, William C. Tolleson, d/b/a Bill Tolleson's Tire Station ("Tire Station"). The citizenship of Tire Station has not yet been clearly established,<sup>3</sup> but its citizenship has no bearing on the remand motion before the Court. See In re Shell Oil Co., 970 F.2d 355, 356 (7<sup>th</sup> Cir. 1992) (post-removal event does not defeat federal jurisdiction that existed at the time of removal).

For these reasons, we determine that Tolleson Automotive was fraudulently joined as a defendant in the Powell case and that removal was therefore proper. The motion to remand is accordingly DENIED. Tolleson Automotive is DISMISSED from this action.

#### Motion to Sever

Firestone has asked the Court to sever from the Powell case the claims of plaintiffs Bertha Gonzalez and Christina Martinez, which arise from an accident in Mexico. Firestone argues that joinder of these claims is not appropriate under Fed.R.Civ.P. 20 because they do not "arise out of the same transaction, occurrence, or series of transactions or occurrences" and do not have a "question of law or fact common to all these persons."

We determine that the plaintiffs in the Powell case, which involves three separate

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<sup>3</sup>Firestone maintains that it owns Tire Station and that Tire Station is not a Mississippi citizen.

personal injury actions arising from three separate accidents and involving different operative facts, should not be joined in one action. Although it may be that the claims have at least one question of law or fact in common, they do not arise out of the same transaction or occurrence, but rather out of three distinct personal injury accidents. Each of the three accidents alleged will be maintained as a separate action.<sup>4</sup> The Powell case is severed into three actions: Powell (which will retain Case No. 01-5509), Santangelo II (to be assigned a new cause number<sup>5</sup>), and Gonzalez (to be assigned a new cause number).

Firestone's Motion to Dismiss Second-Filed Case and Plaintiffs' Motion for Voluntary Dismissal of Santangelo I

As noted above, Gina Santangelo and Brandon Boisclair filed two actions based on the same accident. Both cases are in federal court and both are pending in this MDL. Firestone has filed a motion to dismiss their claims asserted in the Powell case (now Santangelo II). This court has broad discretion to dismiss the second-filed case and to allow only the first-filed case to proceed. See, e.g., Serlin v. Arthur Anderson & Co., 3 F.3d 221, 223 (7<sup>th</sup> Cir. 1993). Exercise of that discretion is particularly appropriate here. Santangelo I was filed where the accident occurred, which is also the state of Gina Santangelo's residence. Mississippi, the state where Santangelo II was filed, has no

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<sup>4</sup>Severance of Santangelo II is important for procedural purposes only, however, because that case is being dismissed.

<sup>5</sup>Assignment of a cause number to this case is for administrative purposes.

connection to the accident or to these plaintiffs. Furthermore, it makes little sense for this court to maintain two separate but identical actions on the docket.<sup>6</sup> For these reasons, Santangelo II is DISMISSED WITHOUT PREJUDICE and plaintiffs' motion for voluntary dismissal of Santangelo I is DENIED<sup>7</sup>.

#### Leave to File Second Amended Complaint in Severed Powell Case

As noted above, the plaintiffs in Powell have sought leave to file a second amended complaint naming Tire Station as a defendant. It appears from the filings related to this motion, however, that pertinent facts regarding the form, ownership, and citizenship of that entity are not entirely clear. Plaintiffs in the Severed Powell case may therefore complete discovery on those and related issues and renew or modify their motion for leave to amend on or before September 3, 2002. Plaintiffs' motion would then be considered for purposes of the Severed Powell case only.

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<sup>6</sup>The parties' arguments on this issue have not been particularly helpful. The plaintiffs want to dismiss their first-filed action (from California) in favor of their second-filed action (from Mississippi). Firestone has cried foul, arguing that it has spent much time and effort on discovery in the California case and that the plaintiffs are trying to avoid the California statute of limitations. The plaintiffs counter that they are simply attempting to resolve a "procedural quagmire" (a quagmire of their own creation, the Court hastens to add). Firestone's arguments are also puzzling – the discovery it has taken should have related to *facts*, not to the particular case denomination or forum; and what statute of limitations applies in a personal injury action is almost always determined by the operative facts, not by the forum state.

<sup>7</sup>In determining this motion, the Court did consider plaintiffs' reply brief, which they requested permission to file out of time on July 15, 2002.

Briefing and Other Case Management Scheduling

In Santangelo I, the plaintiffs have requested additional time following the Court's ruling on their motion for voluntary dismissal to respond to Firestone's (1) motion to dismiss their claims on spoliation grounds and (2) motion for summary judgment on Gina Santangelo's claims based on the statute of limitations. That request is GRANTED. The plaintiffs shall respond to these motions on or before September 3, 2002. Firestone may file replies within twenty-one days thereafter.

Firestone has sought clarification and/or modification of certain case management deadlines in Powell. That motion is GRANTED as follows: (1) the Severed Powell case shall be deemed a fourth quarter 2001 domestic case for case management purposes; (2) the Gonzalez case shall be deemed a fourth quarter 2001 "*forum non conveniens*" case for case management purposes.

It is so ORDERED this \_\_\_\_ day of July, 2002.

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SARAH EVANS BARKER, JUDGE  
United States District Court  
Southern District of Indiana

Copy to:



Irwin B Levin  
Cohen & Malad  
136 North Delaware Street  
P O Box 627  
Indianapolis, IN 46204

William E Winingham  
Wilson Kehoe & Winingham  
2859 North Meridian Street  
PO Box 1317  
Indianapolis, IN 46206-1317

Randall Riggs  
Locke Reynolds LLP  
201 N Illinois St Suite 1000  
PO Box 44961  
Indianapolis, IN 46244-0961

Daniel P Byron  
Bingham McHale  
320 N Meridian St  
1100 Chamber of Commerce Bldg  
Indianapolis, IN 46204